Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1018

WILLIAM L. DELAY,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

REPLY BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Is the constitutional guarantee of due process of law violated by an anti-theft provision of the Illinois Vehicle Code whereby a person transgressing its terms can be imprisoned for up to three years with no proof of criminal intent on his part?

ARGUMENT

(a)

THE STATUTE IN QUESTION CREATES A VARIANT OR EQUIVALENT OF THE LARCENY-TYPE OFFENSES DISCUSSED IN *MORISSETTE* AND, THUS, REQUIRES PROOF OF *MENS REA*.

In its brief the Respondent argues that *Morissette v. United States*, 342 U.S. 246 (1952) ". . . did not purport to present constitutional parameters limiting the State's power to legislate strict liability offenses." (R. Br. p.3) The Respondent may be correct in this view of *Morissette*. However, the central question presented by the instant case is, what are the constitutional parameters limiting a State's power to legislate strict liability offenses? And a very important question it is.

The Respondent's argument is twofold. First, the statute in question is a regulatory public welfare statute and, therefore, strict criminal liability is constitutionally permissible. Second, the statute in question does not create a larceny-type offense analogous to the one at issue in *Morissette*.

As to the latter contention, the Respondent in its brief argues that just because

> ". . . the section falls within an article entitled "Anti-Theft Laws" does not make it analogous to the larceny-type offense at issue in Morissette. Rather, the classification itself indicates that the statute is preventative and not punitive—a type rarely encountered at common law. See *United States v. Balint*, 258 U.S. 250, 251, 252 (1922).

However, a reading of the Article in question makes it clear that it is very much concerned with preventing the

theft of vehicles and their component parts by punishing those who violate its prohibitions. (See Article I, Ch. 95½, Sec. 4-100 et seq. Ill. Rev. Stat. 1977, pp. 1333-1335). By its own terms it is an "ANTI-THEFT LAW." It is thus a variant or equivalent of the larceny-type offenses discussed in *Morissette*, and held therein to require a *mens rea*, 342 U.S. at 260, 261.

Nor can it be held that the statute in question is preventative and not punitive. All criminal statutes are preventative in the sense that they seek to prevent a particular type of conduct. However, they are preventative by being punitive. By their terms they punish those who would engage in the prohibited conduct. Thus, it does not make sense to say that the statute in question (or any criminal statute, for that matter) is preventative, but not punitive. By its very nature, a criminal statute has to be punitive. Nor does the case cited by the Respondent, *United States v. Balint*, 258 U.S. 250, 251, 252, draw any distinction between a preventative criminal statute, as opposed to a punitive criminal statute. Indeed, no such distinction can be logically drawn.

However, the dichotomy that the Respondent has attempted to draw between a preventative criminal statute, as opposed to a punitive criminal statute is indicative of the irreconcilable dichotomy that besets the Respondent's position herein.

For one act, namely, signing "J. Dags" to the certificate, the Petitioner was charged with two separate crimes. On the charge of forgery the Respondent was required to show that the Petitioner acted with *mens rea*. It failed to do so and the judge directed verdict in the Petitioner's favor. For the other crime, the Respondent contends that it is not required to prove *mens rea* because the Petitioner committed a "regulatory" crime.

In the Respondent's view, it is as though there are two distinct types of crimes; First "real" crimes, like forgery, which require proof of *mens rea*; Second, "regulatory" crimes which do not require such proof. And in the Respondent's view, the Petitioner had the great misfortune to commit an act which simultaneously fell into the two different categories of crime.

Thus, for the alleged criminal act of signing "J. Dags" to the salvage certificate, the State of Illinois was, at one and the same time,

(1) required to prove that the Defendant acted with *mens rea*, and

(2) not required to prove that the Defendant acted with *mens rea*.

One would think that under our system of laws, resting as it does on logic and fairness, that the commission of a criminal act by a person would either require (a) that the State prove that the person acted with *mens rea*, or (b) that the State not be burdened with so proving. When, as in the instant case, the State is both required to prove *mens rea*, and yet not required to prove *mens rea*, in order to sustain a conviction for a single alleged criminal act, the bounds of logic have been reached and passed.

The logic of the law requires that there be a unitary standard concerning the requirement of *mens rea* for criminal conduct. The alleged crime of signing "J. Dags" to the salvage certificate either required that the Petitioner acted with *mens rea*, or it did not so require. The State of Illinois can not have it both ways, and simple logic will not have it both ways.

The Petitioner submits that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the

principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). And the State of Illinois should be bound by this rule.

(b)

EVEN IF THE STATUTE IN QUESTION BE CONSIDERED TO BE A REGULATORY PUBLIC WELFARE STATUTE, PROOF OF *MENS REA* IS STILL REQUIRED.

The Respondent argues that the crime involved in *Morissette* was distinguished therein from crimes proscribed by regulatory public welfare statutes (R. Br. p.3). The Respondent then quotes at some length from *Morissette*, 342 U.S. at 256 concerning the characteristics of such regulatory crimes. What the Respondent failed to include, however, was the last few lines of the paragraph from whence the quote came. The Court in *Morissette* concluded that paragraph on strict liability regulations as follows:

> "Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving." (*Morissette, supra* p. 256)

This, of course, highlights one of the central constitutional problems in the instant case. For, the Petitioner's penalty was not small and a felony conviction does grave damage to a person's reputation. Because of the severe penalty involved herein, the Petitioner reasserts that the Illinois statute does not fit the definition of a strict liability statute as set forth in *Morissette*, supra, 342 U.S. at 256, and in Justice Brennan's concurring opinion in *United States v. Freed*, 401 U.S. 601, 613 (1971),

which adopted approvingly the standards set forth by Judge, now Justice, Blackmun in *Holdridge v. United States*, 282 F.2d 302, 310 (CA 8, 1960).

The Respondent further argues that

> ". . . this Court has construed strict liability statutes resulting in more onerous consequences than those found herein. E.g. *United States v. Freed*, 401 U.S. 601 (1971) (ten years); *Williams v. North Carolina*, 325 U.S. 226 (1945) (ten years); *United States v. Balint*, 258 U.S. 250 (1922) (five years). (R. Br. p.6).

However, these cases are distinguishable from the instant case.

In *United States v. International Minerals*, 402 U.S. 558, 564, 565 (1971) Justice Douglas, in delivering the Court's opinion, said:

> "In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*, "*mens rea*" as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."

The Petitioner is also uncertain as to whether or not the crime involved in *Freed* (possession of unregistered hand grenades) was a strict liability crime. For, it is difficult to see how a person could innocently possess unregistered hand grenades, particularly in a State, California, where the possession of grenades is illegal (*Freed*, supra, 401 U.S. at 604). As Justice Douglas

noted in the Court's opinion ". . . one would hardly be surprised to learn that possession of hand grenades is not an innocent act." (*Freed*, supra, p. 609).

The case of *Williams v. North Carolina*, 325 U.S. 226 (1945) involved charges of bigamous cohabitation and, for the most part, concerned the full faith and credit clause of the Constitution. However, the issue of whether or not the Defendants acted fraudulently in obtaining Nevada divorces was presented to the jury, see *Williams*, pp. 235, 236.[1] In the instant case the issue of whether the Petitioner acted fraudulently, or with any culpability whatsoever, was not presented to the jury.

The Petitioner's case does not involve dangerous drugs or hand grenades, but simply a vehicle title. And one must ask, what substantial State interest can there possibly be that justifies denying to the Petitioner his right to litigate his culpability before the jury?[2] None, it would appear. This is particularly so, as this is a case of first impression in Illinois, even though the statute in question has been in effect since 1967. Thus, enforce-

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[1] Justice Murphy, in his concurring opinion, which was joined by Chief Justice Stone and Justice Jackson, relies, in large part, on the fact that the jury found the defendants to have acted fraudulently, *Williams*, supra, pp. 240, 241. Justices Rutledge, Black and Douglas dissented.

Williams was the only one of the three cases cited by the Respondent that involved actual prison sentences. Mr. Williams was sentenced to three to ten years imprisonment and the second Mrs. Williams to three to five years imprisonment, *State v. Williams*, 220 N.C. 445, 17 SE2d 769 (1940). Both *Balint* and *Freed* involved appeals of dismissed indictments.

[2] For a lengthy and compelling article arguing that strict criminal liability ought to be recognized as fundamentally wrong as a matter of constitutional law, see Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Law Due Process*, 24 Wayne Law Review 1572 (Sept. 1978). See also, Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107 (1962).

ment of the statute would hardly be hampered by requiring the Respondent to prove that the Petitioner acted with criminal intent.

It is interesting to note that in the Respondent's view the Petitioner would not have been convicted had he been authorized to sign the name, "J. Dags," R. Br. p. 5. The Respondent concedes that one can sign a false name (*i.e.*, a name other than one's own) under certain circumstances, namely, when one is authorized to do so. This is so, even though the statute in question sets forth no provisions allowing the signing of others' names by those so authorized. However, the jury was never instructed that it could acquit the Petitioner if it found that (a) he was authorized to sign the name "J. Dags" to the salvage certificate, or (b) that he acted with the belief that he was authorized to sign the name "J. Dags."

The jury was simply instructed as follows:

> To sustain the charge of an Offense Relating to Titles and Registrations, the State must prove the following propositions:
>
> That the defendant did use a false or fictitious name on an application for a salvage certificate. (R. C122).

That was the sole proposition that the State had to prove. Under the instructions given, even if the jury believed that Petitioner was authorized to sign "J. Dags", it would have been required to find the Petitioner guilty. For, it was clear from the evidence that the Petitioner signed a false name, a name other than his own.

If, in fact, a scheme of authorization was implicit in the actual operation and interpretation of the statute (particularly in determining what constituted a "false name"), judicial instructions relating to that scheme of

authorization should have been given to the jury. The failure to give such instructions constitutes a violation of the Petitioner's right to due process of law.

(c)

THERE HAVING BEEN NO PROOF OF *MENS REA*, THE PETITIONER'S SENTENCE WAS SO DISPROPORTIONATE AS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In its brief the Respondent argues that "the consequences of [the statute's] violation are not so severe, . . . as to bring into question its compliance with Due Process" (R. Br. p. 7). The Petitioner believes that the contrary is the case.

As Justice Frankfurter stated in his dissenting opinion in *Lambert v. California*, 355 U.S. 225, 231 (1957).

> Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment.

In the recent case of *Rummel v. Estelle*, 48 LW 4261, 4262, 4263 (dec. March 18, 1980) it was noted that "[T]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. See, e.g., *Weems v. United States*, 217 U.S. 349, 367 (1910)."[3] *Weems* involved the intentional falsification of

[3] As to the States, cruel and unusual punishment is prohibited by the 14th Amendment, *Robinson v. California*, 370 U.S. 660, 667 (1962).

information in a public record, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire for it." See *Weems*, pp. 363 and 365. In *Rummel*, 42 LW at 4263, this Court was struck by "the triviality of the charged offense" in *Weems*.

The instant case, like *Weems*, involves the alleged falsification of a public record. As in *Weems* there was no injury to person or property.[4] And, also, like *Weems*, the charged offense is trivial.[5] However, unlike *Weems*, there is no allegation or proof of criminal intent in the instant case.[6] Therefore, is it not a violation of due process to imprison a man for two years for a trivial offense which he may have accidentally committed?

In *Robinson v. California*, 370 U.S. 660, 667 (1962) this Court held unconstitutional a statute making it a crime to be addicted to narcotics. Justice Stewart stated therein

> "To be sure, imprisonment for ninety days is not, in the abstract a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold." (*Robinson v. California*, supra, p. 667.

[4] The Respondent characterizes the statute involved as one whose violation "may result in no direct or immediate injury to person or property but merely create(s) the danger or probability of it which the law seeks to minimize . . ." (R. Br. pp. 3, 4).

[5] Admittedly, the punishment in *Weems* was much more severe. Nonetheless, the punishment visited upon the Petitioner is very severe.

[6] The lack of a *mens rea* in the instant case should provide the "objective factor" desired by the Court in *Rummel* in order to determine if punishment is cruel and unusual. See *Rummel v. Estelle*, 48 LW 4261, 4264.

If it is a violation of due process to imprison a man for being a narcotics addict, why is it not a violation of due process to imprison a man for two years for accidentally signing a false name to a vehicle title? There may well be a higher degree of moral fault in one's becoming the former than in one's doing the latter.[7]

In *Rummel v. Estelle*, 48 LW at 4263, this Court quoted approvingly from the opinion of Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 306 (1972) wherein he stated:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

It is obvious that a person who has been convicted of an absolute liability crime cannot be rehabilitated. For, a State can only rehabilitate a person who is morally responsible for his crime. And an absolute liability "criminal" is, by definition, not morally responsible, as he acted without *mens rea*. He, as humans are sometimes wont to do, simply made an innocent mistake.

As Justice Powell stated in his dissent in *Rummel v. Estelle*, 48 LW at 4267:

> "The scope of the Cruel and Unusual Punishment Clause extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate. Disproportionality analysis

[7] Saltzman in his article on *mens rea* speaks of the decision in *Robinson v. Calif.*, supra, as follows: "This holding might well rest on the assumption that constitutional weight is to be given to avoiding morally undeserved punishment." Op. Cit. 24 Wayne Law Review 1572, 1616 (1978).

> measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."

Likewise, the Petitioner's sentence herein offends our sense of justice. What the Petitioner did is, in no way, deserving of the severe sentence of two years imprisonment. Like the Court in *Weems*, supra, we ". . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." 217 U.S. at 367. That proportion is totally lacking here.

It is written in the heart of man that he should not be imprisoned for two years for an act innocently done. Let it now be written in the law of our constitution.

CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A

COMMENTARY ON CERTAIN FACTS

Following is a short commentary on certain facts in this case which, while not essential to the constitutional issue herein, are of some interest nonetheless.

In its brief, the Respondent argues as follows:

> Petitioner's contention, that it did not matter what name he signed to the salvage certificate application, is incorrect. First, had he signed his own name rather than "Motor Ins. Co. by J. Dags," Ms. Caldwell's assumption that he was an agent of the insurance company would not have been reasonable and she would have been more cautious to inquire as to the existence of any power of attorney. Second, with respect to tracing the ownership of the vehicle, the records incorrectly reflected that "Motor Ins. Co. by J. Dags" applied for a salvage certificate on November 23, 1977. (R. Br. p. 4, n.3)

First, Ms. Caldwell knew that the Petitioner was not J. Dags (4a).[1] Since she assumed that the Petitioner was an agent of the insurance company (and thus empowered to sign for it), it obviously did not concern her as to what name the Petitioner signed. Since she assumed the Petitioner's agency, why would she have been bothered if the Petitioner signed his own name? It is not logical to argue that "she would have been more cautious" had the Petitioner done so. Most people become cautious when you sign someone else's name, not when you sign your own.

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[1] Refers to the opinion of the Court below printed in Appendix 2 of the Petition for Certiorari.

Second, with respect to tracing the ownership of the vehicle, if we assume that the Petitioner (or anyone else, for that matter) had been directly authorized by J. Dags to sign her name and then did so, the title records would be similarly "incorrect". Trial testimony revealed that it is a common practice in the Illinois Secretary of State's Office for persons to sign the names of others to vehicle titles. As is shown in the instant case, the authorities in charge of the Title Division operate on the assumption that said persons are properly authorized. So there must be thousands upon thousands of Illinois vehicle titles signed by agents using the names of others. Would the Respondent view all these as likewise "incorrect"?

In its Brief, p. 2, the Respondent states as follows: "Although petitioner testified that he had obtained a power of attorney from John Bishop, he admitted that Bishop did not hold any certificate showing that title had been transferred to Bishop by the insurance company (R. 84)."

While this is true, the Petitioner testified that John Bishop did show him a salvage title in the name of Motors Insurance Company, and that Bishop told him that he had bought the car from that Company (R. 83, 84).[2] The Petitioner also testified that Bishop showed him a piece of paper stating that Bishop had bought the car from Motors Insurance (R. 84, 85).

The Respondent also asserts that "Petitioner denied that he had been told to sign any specific name to the application (R. 94, 95)". (R. Br. p. 2). The record in relevant part is as follows:

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[2] All transcript references are to the Report of Proceedings of July 18, 1978.

Cross Examination by Ronald J. Stone, Assistant State's Attorney.

Q. Neither Miss Caldwell nor Miss Hoagland ever told you to sign J. Dags, did they?
A. She told me to sign this name that was in question.
Q. Could you repeat that answer?
A. She had the microfilm copy and she said sign it like this.
Q. She said sign it like this?
A. Right.
Q. Didn't you say on direct examination she just said sign this?
A. Yeah, she said sign it, but the microfilm copy was there, sir, otherwise I wouldn't have known what to sign. (R. 94).